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No. 84-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., et al.,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., and BROADCAST MUSIC, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BROADCAST MUSIC, INC. IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals err in holding that petitioners had failed to prove that the blanket licenses offered to local television stations were an unreasonable restraint of trade, where there was no evidence that those licenses restrained anyone from bargaining over the purchase and sale of performing rights to individual musical compositions?

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Respondent Broadcast Music, Inc. ("BMI") submits this brief in opposition to the petition filed by Buffalo Broadcasting Company, Inc., et al. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE

Preliminary Statement

Petitioners ask this Court, in effect, to reconsider its earlier denial of the writ of certiorari sought by CBS in *Columbia*

1 In compliance with Supreme Court Rule 28.1, BMI states that it has no parent, subsidiary or affiliated corporations.

Broadcasting System v. American Society of Composers, Authors and Publishers, 450 U.S. 970 (1981), on precisely the same legal issues raised by petitioners here.[2]

Petitioners this time are five owners of local television stations, acting on behalf of a trade association called the All-Industry Television Station Music License Committee,[3] and a plaintiff class consisting of all United States commercial television station owners, other than CBS, NBC, and ABC.

Respondents are the two leading music performing rights societies, BMI and the American Society of Composers, Authors and Publishers ("ASCAP"), and two defendant classes, consisting of all copyright owners affiliated with BMI and members of ASCAP, respectively.

The blanket licensing practices at issue are identical to those in *BMI v. CBS*, 441 U.S. 1 (1979) ("*CBS*"), except that the licenses apply to non-network programs and are issued to individual stations rather than networks. The licenses "give the licensees the right to perform any and all of the compositions owned by the members [of ASCAP] or affiliates [of BMI] as often as the licensees desire for a stated term." *CBS*, 441 U.S. at 5. As in *CBS*, it is uncontested that BMI and ASCAP obtain only non-exclusive rights to the works in their repertoires, and that individual copyright owners remain free to license their musical works directly to music users outside of the blanket licenses.

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2 While we are mindful that denial of a petition for a writ of certiorari does not constitute precedent as to issues raised by the petition, we think it is nonetheless significant that the issues raised here are identical to the issues raised by CBS and as to which these petitioners have already been heard as *amici curiae* in this Court. See *infra* at 3-4.

3 The Committee, which claims to represent all non-network owned television stations, was formed by the National Association of Broadcasters, and since 1949 has acted as the collective bargaining agent for all local stations in separate, periodic licensing negotiations with BMI and ASCAP. (Petitioners' Appendix ("Pet. App.") 43a.)

The *CBS* Precedent

Petitioners began this action in 1978, shortly after the Court of Appeals for the Second Circuit had held blanket licensing of CBS by BMI and ASCAP to be illegal *per se*. *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977). The local television broadcasters initially sought a *per se* ruling for themselves as well, contending both in their separate complaint and as *amici curiae* in this Court in *CBS* that the licenses involved price fixing and were not subject to the rule of reason. *See CBS*, 441 U.S. at 17 n.26. This Court however rejected the Second Circuit's *per se* analysis, pointing out that the blanket license was an additional product in the marketplace, with many efficient, pro-competitive characteristics:

> "The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions without the delay of prior individual negotiations, and great flexibility in the choice of musical material."

Id. at 22 (footnote omitted).[4]

Indeed, the Court noted that such benefits would appear to be even more obvious for dispersed music users, such as local television stations, than for large networks:

> "With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations. . . ."

Id. at 21.

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4 The Court also noted:

> "[The blanket license] reduces costs absolutely, . . . [is] sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. . . .
>
> "This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses."

CBS, 441 U.S. at 21 (footnotes omitted).

The Court remanded the case to the Second Circuit for an assessment of the blanket license under the rule of reason. On remand, the local television stations appeared again as *amici curiae*, and took the position that the present case and *CBS* are indistinguishable:

> "I say, your Honor, it's the same license, and the same practice, and the same everything."

(Transcript of Oral Argument, *CBS v. ASCAP*, No. 75-7600 (2d Cir. Nov. 20, 1979) at 143-44.)[5]

The Second Circuit ruled against CBS, concluding that the network had failed to prove that the blanket license had any anti-competitive effect, since there was a "realistic alternative" to the blanket license available—*i.e.*, CBS "can feasibly obtain individual licenses from competing copyright owners. . . ." *CBS v. ASCAP*, 620 F.2d 930, 938 (2d Cir. 1980) ("*CBS-remand*").[6] Accordingly, the Second Circuit found it unnecessary to engage in any weighing of pro- and anti-competitive effects.

CBS petitioned this Court for review. The local stations again filed an *amicus* brief, supporting the contentions of CBS and urging the identical position set forth in their present petition.[7] This Court denied certiorari. 450 U.S. 970 (1981).

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5 Perhaps in recognition of the identity of legal issues, the Second Circuit granted petitioners the privilege, unusual for *amici*, of oral argument.

6 CBS had failed, among other things, to adduce any evidence that it had ever attempted to purchase performing rights from an individual composer, publisher, or television producer, or that music copyright owners would not respond to offers of competitive prices to have their works performed on network television.

7 Portions of the present petition are taken *in haec verba* from that brief.

Prior Proceedings

The results in *CBS* and *CBS-remand* precipitated a mid-course change of direction for these petitioners. Abandoning their price-fixing theme, they began sometime in 1980 a letter-writing campaign, directed by their litigation counsel, demanding (without offer of payment) that program syndicators clear the music in their programs "at the source." Petitioners' objective was to create a "paper record" that would establish the lack of a "realistic alternative" to the blanket license and thus avoid the strictures of the holding in *CBS-remand*.[8]

Following a bench trial, the district court (Lee P. Gagliardi, J.) ruled in petitioners' favor, holding that there were no realistically available alternatives to the blanket license. The district court purported not to rely on the results of petitioners' mid-litigation letter-writing gambit, finding that such evidence was:

> "so darkened by the shadow of the approaching trial that its results may not be relied upon to support either side."

(Pet. App. 76a.)[9] Rather, the decision rested almost entirely on the observation made by the judge on the first day of trial that "CBS is not [WIVB] in Buffalo." (Trial Transcript, Nov. 16, 1981, at 49.) Presumably the trial should have stopped at that point, since this insightful finding of fact led to the judge's dispositive economic analysis that the stations, lacking the market power of CBS, could not "pressure" or "compel" individual copyright owners or program producers into licensing performing rights individually and thus had no realistic alternative to the blanket license. (Pet. App. 73a, 78a.)[10] This

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8 See Pet. App. 28a, 30a.

9 Despite its acknowledgement that petitioners' evidence was fatally tainted, the district court faulted BMI and ASCAP for failing to rebut it, thereby improperly shifting the burden of proof to the defendants. (See Pet. App. 77a.)

10 The district court concluded: "[T]he major distinction between this case and *CBS* is that local stations do not have the market power or resources to compel source or direct licensing." (Pet. App. 70a n.36.)

conclusion, coupled with a confused analysis of the evidence and an impermissible shifting of the burden of proof, provided the basis for Judge Gagliardi's distinguishing of the *CBS* precedent.

The Second Circuit (Judges Newman, Winter, and Pratt) unanimously reversed, concluding:

> "the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade in the legal and factual context in which it currently exists."

(Pet. App. 4a.)

The court below reviewed the evidence relating to three alternatives to blanket licensing considered by the district court: (1) the per program licenses offered by BMI and ASCAP, (2) direct licensing by copyright owners, and (3) clearance "at the source" by program producers and syndicators. With respect to direct licensing and clearance at the source, the court of appeals rejected the trial court's "compulsion" theory of economics because "it disregards the functioning of a market." (Pet. App. 25a.) Instead, the court of appeals concluded that the lure of additional performances and profits would be sufficient to attract copyright owners and program producers and syndicators to these alternative licensing methods. The per program license was also held to be available as a transitional device for any station electing to switch partially from blanket licensing to individual licensing.[11]

The Second Circuit came to its conclusions after painstakingly evaluating the district court's treatment of the evidence, noting some 16 failures of proof on the petitioners' part, among which the following stand out:

- There was no "evidence that any local station ever offered any composer a sum of money in exchange for the performing rights to his music." (Pet. App. 24a);

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11 The per program licenses offered by BMI and ASCAP are full-repertoire licenses for which payment is made solely on the basis of revenues from programs actually using the licensed music. If the music is

- "The plaintiffs have not presented evidence to show that a brokering mechanism would not handle direct licensing transactions if the stations offered to pay royalties directly to copyright proprietors." (Pet. App. 26a);

- "Prior to bringing this lawsuit, the stations had not sought to obtain performing rights via source licensing." (Pet. App. 28a; footnote omitted);

- "Judge Gagliardi properly declined to give any probative weight to the plaintiffs' transparent effort to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing." (Pet. App. 30a);

- "There is no . . . finding as to what prices the [District] Court thought stations would have to offer to obtain source licensing. That is not surprising in view of the failure of the plaintiffs to present evidence to show either what such prices might be or that they would be 'premium' in the sense of significantly exceeding an objectively reasonable value of the rights obtained." (Pet. App. 31a);

- "Our task, in determining whether plaintiffs have presented evidence sufficient to support a conclusion that the blanket license is a restraint of trade, is not to psychoanalyze the sellers but to search the record for evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices. Plaintiffs have simply failed to produce such evidence." (Pet. App. 32a);

- "[T]he evidence does not establish that barring the blanket license as to syndicated programs would add

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licensed by the copyright owner directly or at the source, no payment is due the performing rights society. (Pet. App. 10a-11a.)

any significant price competition among songs that the blanket license allegedly prevents. . . . [I]t is entirely a matter of speculation whether replacement of the blanket license with source licensing would add any significant increment to price competition at the point where the syndicators decide which music to use." (Pet. App. 34a); and

- "Since the blanket license restrains no one from bargaining over the purchase and sale of music performance rights, it is not a restraint unless it were proven that there are no realistically available alternatives. . . . [T]he plaintiffs did not present evidence to establish the absence of realistic alternatives." (Pet. App. 35a).

In concurring below, Judge Winter expressed the hope that the extensive scrutiny of blanket licensing of music in *CBS, CBS-remand*, and the instant case would discourage future litigation over the legality of such licensing, noting:

> "The result of this scrutiny has been to demonstrate that so long as composers or producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artifical barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition. In those circumstances, it is simply one alternative competing on the basis of price and services with others."

(Pet. App. 37a.)

The stations' petition for rehearing containing a suggestion for rehearing en banc was denied without any judge requesting that a vote be taken. (Pet. App. 102a-03a.)

SUMMARY OF ARGUMENT

Petitioners were unsuccessful in their *amicus* efforts to secure a different result in *CBS*, and identical deficiencies in proof have caused them to be unsuccessful in this tag-along action. Their efforts to relitigate the denial of CBS' certiorari petition are unworthy of this Court's consideration.

The Second Circuit's decision is not only consistent with *CBS*, but also with two later opinions of this Court: *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Those decisions explicitly distinguish non-exclusive blanket licenses from horizontal agreements limiting competition and confirm that the test adopted by the Second Circuit is the appropriate threshold examination. Both decisions place emphasis on the fact that under the blanket licenses offered by BMI and ASCAP "each individual remained free to sell his own music without restraint." *NCAA*, 104 S. Ct. at 2968; *see Maricopa*, 457 U.S. at 355. The decision below is also consistent with other copyright and patent pooling cases in this Court and the courts of appeals.

Petitioners are unable to cite a single case which questions, criticizes, or disapproves the Second Circuit's application of the rule of reason in *CBS-remand* or the present case. Nor can they point to any case incorrectly decided as a result of a court's reliance on the Second Circuit opinions. On the occasions when parties engaged in anti-competitive conduct have attempted to fit within the "no restraint" language of *CBS-remand*, courts have had no trouble making the necessary distinctions.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

I. PETITIONERS' EFFORTS TO REARGUE THE PRECEDENTS CREATED IN THE *CBS* LITIGATION DO NOT MERIT CONSIDERATION BY THIS COURT.

This Court in *CBS* determined that the law governing an antitrust challenge to the identical license and practices at issue here is the rule of reason. The content of a rule of reason analysis is familiar and settled law for which no further treatment by this Court is warranted.

Petitioners argue here, however, as they did in *CBS*, that the Second Circuit failed to carry out the mandate of this Court and did not apply the rule of reason correctly to the evidence presented. Although this evidentiary issue can scarcely be considered one of profound importance or far-reaching effect, the fact remains that petitioners are wrong in this assertion.[12]

Their argument amounts to nothing more than a play on words and an attempt to relitigate here the result in *CBS-remand*.[13] The court of appeals made clear in its opinions in this

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12 The petition here seeks review only on the issue of whether the court of appeals applied the correct legal standard in conducting its rule of reason analysis of the local station blanket license. Petitioners do not seek review of, or contest, the court of appeals' conclusions that the various alternatives to the blanket license were, as a matter of fact, available.

13 The Second Circuit, they say, erred in *CBS-remand* by creating a new test which requires proof at the threshold that the challenged practice "restrains" trade. The petitioners claim that there must have been a restraint here, citing Justice Brandeis' words in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), that "[e]very agreement concerning trade, every regulation of trade, restrains." This argument is pure casuistry. Justice Brandeis was distinguishing between "restraint" in the layman's sense and "restraint of trade" as an antitrust term of art. In the latter sense, he explained, restraint refers only to activity which has an adverse effect on competition. *Cf.*

case and in *CBS-remand* that, when it found no restraint, it was concluding that plaintiffs had failed to prove any adverse effect on competition among individual copyright owners. The court below considered in *CBS-remand* whether this Court's mandate to examine the blanket license under the rule of reason left it free to entertain the contention that the blanket license has no anti-competitive effect at all. 620 F.2d at 934. In concluding that it was free to deal with this argument, the Second Circuit pointed to this Court's statement that it was " 'uncertain whether the practice on its face has the effect . . . of *restraining* competition among the individual composers.' " *Id.* at 935 (quoting *CBS*, 441 U.S. at 13) (emphasis added).[14]

The Second Circuit then examined CBS' proof (and the arguments of these petitioners as *amici*) to see whether in fact the blanket license had "restrained" such competition—*i.e.*, whether it had any adverse effect on the availability of individual licenses from competing composers. Balancing of pro- and anti-competitive effects was not necessary in *CBS-remand*, since there was nothing negative to weigh against the obvious advantages of the license.

In dealing with the separate claims of the local television stations in the instant litigation, the court below did not rest its decision on the record in *CBS-remand*, but independently evaluated all of the evidence introduced by petitioners relating to the effects of the blanket license on the behavior in the local television market of copyright owners, television syndicators, and these petitioners. It also reviewed the origin of the licenses,

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Standard Oil Co. v. United States, 221 U.S. 1, 56 (1911). It was obviously in the familiar antitrust sense that the court of appeals found there to be no restraint here and in *CBS-remand*.

14 In addition, the court of appeals in *CBS-remand* cited as precedents supporting this conclusion *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), and *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931), in which blanket licenses covering patent pools were upheld under the rule of reason on the ground that licensees had not been foreclosed by the pooling arrangements from the option of obtaining licenses for the individual patents. 620 F.2d at 936.

the history of litigation concerning them, the implications of the consent decrees applicable to both BMI and ASCAP, and the significance of the separate rights of synchronization and public performance provided by the Copyright Act.

The reversal of the trial court's decision, however, was based on the identical failure of proof of restraint in this case as in *CBS-remand*. Like CBS, the individual stations had never genuinely attempted to contact individual composers, publishers, or clearance agents for music performing rights; they had never asked program producers or syndicators to "clear" such rights before delivering programs to the stations; and they had never sought to make use of the per program license alternative. And like the network, they had no evidence that composers and publishers were using the blanket license to mask a horizontal agreement among themselves to refrain from direct or source licensing.

In its extensive discussion of the evidence, the court below was engaged in traditional rule of reason analysis, and its conclusion that the evidence was insufficient as a matter of law to require further evaluation of the license and practices in issue was entirely consistent with the mandate in *CBS*. Nothing has occurred in the four years since this Court denied certiorari in *CBS* to warrant renewed consideration of the *CBS* legal issues.

II. THE DECISION BELOW FOLLOWS THE DECISIONS OF THIS COURT AND APPLIES THE APPROPRIATE RULE OF REASON ANALYSIS.

As shown in Point I, the Second Circuit's use of the "no restraint" phraseology to refer to the lack of any anti-competitive effect was borrowed from the opinion of this Court in *CBS*, and its use has subsequently been endorsed by later decisions of this Court dealing with that opinion. *See Arizona v. Maricopa County Medical Society, supra*, 457 U.S. 332, and *NCAA v. Board of Regents, supra*, 104 S. Ct. 2948.

In *Maricopa*, the Court was confronted with a maximum price fixing feature of a medical care plan run by two medical societies. Faced with the defendants' contention that this restraint, like the BMI and ASCAP blanket licenses, constituted price fixing "only in the literal sense," the Court stated:

> "The so-called 'blanket license' was entirely different from the product that any one composer was able to sell by himself. Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement *did not place any restraint* on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price."

457 U.S. at 355 (footnotes omitted; emphasis added). And in support of this "no restraint" reading of *CBS*, the *Maricopa* Court cited this key passage from *CBS*:

> " 'The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets.' "

Id. at 356 n.32 (quoting 441 U.S. at 23-24).

Because the doctors in the medical plan had not combined to offer a new product different from the sum of their individual services (like the blanket license), but had instead agreed to set the maximum prices they would charge in their individual practices, the *CBS* precedent was distinguishable, and the plan was found to be *per se* illegal.[15]

In the *NCAA* case, certain member schools of the NCAA challenged the association's television plan for college football games, which restricted the number and identity of games to be

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15 The dissent in *Maricopa* argued that the medical plan did create a new product, like the blanket license, and therefore should not be condemned as illegal *per se*. 457 U.S. at 365 n.12. It also pointed to the fact that physicians were free to deal with other insurers, to treat patients not participating in the plan, or to quit the plan after a year. *Id.* at 360. The dissent is, thus, consistent with Judge Newman's reading of *CBS* as well.

broadcast and the fees to be paid to the schools for the broadcasts. Finding these restrictions unjustified by any redeeming pro-competitive virtues, the Court concluded that the plan was illegal under the rule of reason.

As a threshold question, the Court considered whether the existence of the NCAA plan actually restrained the conduct of the individual schools. The Court concluded:

> "And, of course, since as a practical matter all member institutions need NCAA approval, members have *no real choice* but to adhere to the NCAA's television controls.[31]
>
> "The anticompetitive consequences of [the NCAA] arrangement are apparent. *Individual competitors lose their freedom to compete*. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.
>
> ---
>
> "31. Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for *restraining* institutions which require its approval."

104 S. Ct. at 2963-64 & n.31 (citations and certain footnotes omitted; emphasis added).[16] Distinguishing the *CBS* case from that of the NCAA, this Court described the music performing rights market as one in which, despite the existence of the blanket license, "each individual remained free to sell his own

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16 In contrast, in the case at bar, individual copyright owners retain their freedom to compete with each other outside the blanket license (Pet. App. 35a); there was no proof that prices for music performing rights under the blanket license are higher than in individually-negotiated transactions (Pet. App. 31a, 34a); the district court found, as did both sides' economic experts, that the blanket license does not restrict output (Pet. App. 82a; Trial Transcript, Dec. 10, 1981, at 1473; Trial Transcript, Dec. 14, 1981, at 1994); and there was no proof that the prices of music performing rights are unresponsive to consumer preferences (Pet. App. 34a-35a).

music *without restraint*." 104 S. Ct. at 2968 (emphasis added).[17]

These passages are consistent with the Court's observation in *CBS* that the network "had a real choice" as to whether to take the blanket license, 441 U.S. at 24, and with the Second Circuit's holding in *CBS-remand* that the existence of such a "real choice" determined whether or not competition had been adversely affected.

The Second Circuit's analysis is also supported by decisions of other courts of appeals. *See, e.g., Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1389 n.3 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); *F.E.L. Publications, Ltd. v. Catholic Bishop*, 214 U.S.P.Q. 409 (7th Cir.), *cert. denied*, 459 U.S. 859 (1982); *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

Petitioners' argument that Judge Newman failed to perform a rule of reason analysis in *CBS-remand* was explicitly considered and rejected in *Los Angeles Memorial Coliseum Commission*:

> "On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven."

726 F.2d at 1389 n.3.

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17 Similarly, the Court observed that:

> "By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—*an agreement among competitors on the way in which they will compete with one another.*"

104 S. Ct. at 2959 (emphasis added; footnote omitted). In the instant case, no such agreement was proved or exists.

In *F.E.L. Publications*, the plaintiff suing for copyright infringement was a music publisher which had amassed a large repertoire of copyrighted hymns. The publisher offered to license the sheet music copying rights to the songs under a blanket license, and also under per-copy licenses. In response to an antitrust counterclaim, the Seventh Circuit explicitly relied on the Second Circuit's opinion in *CBS-remand* to uphold the publisher's blanket licenses, concluding:

> "[T]he ACL [Annual Copying License] does not restrain trade or have anti-competitive effects if an alternative opportunity to acquire rights to individual songs is fully available."

214 U.S.P.Q. at 415.

Finally, in *K-91*, a radio station attacked the legality of the ASCAP blanket license under the antitrust law. As one of its grounds for its holding in favor of ASCAP, the Ninth Circuit stated:

> "ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

372 F.2d at 4.

III. THE SECOND CIRCUIT'S DECISIONS BELOW AND IN *CBS-REMAND* CAN HAVE, AND HAVE HAD, NO ADVERSE EFFECT ON ANTITRUST ENFORCEMENT.

The Second Circuit's opinions below and in *CBS-remand* cannot have, and have not had, an adverse impact on antitrust enforcement. They are just two rule of reason cases, concerned with a *sui generis* product, where plaintiffs failed to meet the burden of proof. If they stand for any general proposition at all, it is that sometimes a plaintiff may present such meager evidence of anti-competitive effect that no evaluation of offsetting pro-competitive benefits is required. This is a truism, and

it cannot possibly hinder antitrust enforcement for courts and prospective plaintiffs to recognize it to be the law.[18]

Petitioners are unable to cite a single decision which criticizes, questions, or disapproves the Second Circuit's application of the rule of reason in *CBS-remand* or in the present case. While antitrust practitioners have, in a number of cases, attempted to use the BMI-ASCAP precedents to justify conduct which illegally restrained competition, the lower courts have had no difficulty making the relevant distinctions.

For example, in *United States v. Columbia Pictures Industries*, 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd mem.*, 659 F.2d 1063 (2d Cir. 1981), four motion picture companies and an oil company proposed to set up a joint venture in the cable television business. The venture would have had exclusive television performing rights to the output of the four studios for the first nine months after the movies were released. The studios argued that they were creating a new product, like the BMI and ASCAP blanket licenses. The district court rejected this contention (made by the attorneys for petitioners herein), noting that the exclusive relationship between the venture and the studios was altogether different from the BMI-ASCAP arrangements in which individual composers remained free to license their own works to anyone at any price. 507 F. Supp. at 427 & n.42. The district court therefore issued a preliminary injunction against the proposed venture.

Similarly, in *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982), and *North American Soccer League v. National Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part and rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), cited by petitioners (Pet. 25), defendants were unsuccessful in convincing the courts that the Second Circuit's opinion in *CBS-remand* provided them with any defense.

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18 As this Court stated last Term, quoting an article by Professor Areeda, " 'the rule of reason can sometimes be applied in the twinkling of an eye.' " *NCAA v. Board of Regents, supra*, 104 S. Ct. at 2965 n.39 (quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* (Federal Judicial Center 1981), at 38).

CONCLUSION

The petition for a writ of certiorari should be denied.

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